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**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

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| SANDRA B. MASINO,<br>Plaintiff and Appellant,<br>v.<br>CALVIN C. S. YAP et al.,<br>Defendants and Respondents. | G045441<br>(Super. Ct. No. 30-2009-00319800)<br>O P I N I O N |

Appeal from a judgment of the Superior Court of Orange County, David R. Chaffee, Judge. Affirmed. Motion for sanctions denied.

Mark B. Plummer for Plaintiff and Appellant.

Oswald & Yap and Niall Sweetnam for Defendants and Respondents.

* * *

Sandra B. Masino appeals from the trial court's judgment denying her breach of contract claim following a bench trial. Entering a defense judgment in favor of Calvin C. S. Yap and his law firm, Oswald & Yap, (collectively, O&Y or the defendants), the trial court excused them from paying the remainder they owed on the purchase of Masino's business facilitating penny stock sales after she agreed to settle a Securities and Exchange Commission (SEC) fraud prosecution concerning the business. Masino does not dispute the trial court's finding she defrauded O&Y by failing to reveal the SEC's investigation at the time she sold them her business, "144 Opinions, Inc." (hereafter 144 Opinions).

Instead, she quarrels with the outcome of a potential remedy the trial court fashioned on *her* behalf before the final judgment. Specifically, the business assets Masino transferred to the defendants included the business's purported goodwill, certain Internet domain names, and Masino's consulting services to aid the defendants in running the business. The taint of the SEC fraud charges, which Masino settled by agreeing not to operate in the industry for five years, severely compromised or eliminated any goodwill in 144 Opinions or value in Masino's consulting services to run the business, but the trial court nevertheless proposed to allow her — although it had rejected her complaint to *enforce* the contract — to rescind the sale and regain the Internet domain names, provided she returned the first $62,500 installment the defendants had paid her for the business. The trial court expressly determined she was *not* entitled to the second and final $62,500 installment owed by the defendants and that the defendants had not breached the contract by failing to pay her that sum.

The court warned Masino that if her refund payment "is not made within the time I specify, then the domain names would . . . remain" defendants' property. But

while Masino offered in writing to refund defendants their $62,500 *subject to certain conditions*, she ultimately failed to make the payment. She contends the trial court erred in concluding she failed to timely make the required payment, and the remedy she demands on appeal is that the judgment be reversed and remanded with instructions that defendants pay *her* the remaining $62,500 to fulfill the contract. Alternatively, she argues she is entitled to a $7,000 profit she asserts she could have gained by reselling the domain names, if only defendants had returned them when she claimed she was ready to refund their money. We find no error in the trial court's conclusion Masino failed to pay defendants their $62,500 as ordered, and we therefore affirm the judgment. As we explain below, we deny defendants' motion to impose sanctions on Masino for filing a frivolous appeal.

## I

## FACTUAL AND PROCEDURAL BACKGROUND

Because the parties have included on appeal very little of the trial record, we glean the origins of their dispute from their briefs. According to the defendants, Masino, a stock broker and sole owner of 144 Opinions, failed to disclose that the true nature of her business consisted of "selling fraudulent SEC rule 144 'opinion letters,'" which "enabled clients to dump otherwise restricted and worthless penny stocks at a considerable profit." "Inevitably, the [SEC] prosecuted," but Masino did not disclose the pending enforcement proceeding as O&Y contemplated buying her business, nor did she disclose that the SEC, in initiating its investigation, had notified her, "'This action concerns a legal opinion mill, which fraudulently facilitated the sale of securities in violation of Federal securities laws.'" According to the defendants, "Desperate to unload her worthless and fraudulent mill, Masino swindled yet another party," O&Y, "dup[ing]

O&Y into buying her . . . mill for $125,000 in October 2008." Masino did not disclose that she and her business "were about to be barred from the industry by the SEC for fraud."

O&Y learned of the SEC's investigation in November 2008, weeks after reaching the purchase agreement with Masino. According to the defendants, "[a]fter stalling for several months," Masino eventually "admitted the SEC charges," whereupon "O&Y immediately terminated Masino's independent consultancy agreement, and refused to pay her $62,500 (the second installment of the $125,000 purchase price)." When Masino sued O&Y for breach of contract for refusing to pay the $62,500 balance, O&Y raised in their defense "fraud by Masino, failure of consideration, and illegality of contract."

Masino's account of the lawsuit does not differ significantly from defendants', except that she minimizes her role in any fraud. On appeal, she describes her former business as one serving "owners of restricted [stocks] who wanted the restrictions removed so they could sell the stock," and therefore would contact "one of the websites or '800 numbers' operated by the corporation to obtain the 'legal opinion letter' required by [SEC] regulation 144." Masino gathered the stockholder's information and passed it on to "one of two lawyers, Albert J. Rasch, Jr. and Kathleen R. Novinger, who would review the information and sign the required opinion letter," which Masino then delivered to the client and received payment.

Masino concedes the SEC began investigating her company in 2008 "as a result of an opinion . . . provided to a business, which in retrospect, was ill advised." She took the position the lawyers were responsible because she "only provided administrative services" and in any event, according to Masino, her lawyer advised her "it would look

better" if her "'book of business' was being operated by a law firm by the time that the SEC got around to evaluating the allegations against her." Consequently, in early October 2008, she met with O&Y who soon offered her $125,000 "for all of the assets and goodwill" of her company, "along with a separate 1 year consulting contract to assimilate the business, with $62,500.00 payable upon acceptance and the remaining $62,500.00 due in one year." Masino accepted on November 3, 2008, began her consulting position with O&Y, and they paid her the initial $62,500 as agreed. Masino notes "[t]here was no written contract although there was a list of assets." The asset list included two telephone numbers, an e-mail address, and 18 Internet domain names (e.g., 144opinions.com, Rule144opinionletters.com, etc.). The asset list also expressly included "all goodwill" and any "customers generated by the above Assets, including all customer contact information and service and payment histories."

According to Masino, when the SEC notified her attorney on November 19, 2008, of "a proposed settlement/judgment," she promptly informed O&Y, who "advised [her] to reject [it] and to hire another attorney" because her lawyer simultaneously represented the subcontracted attorneys she blamed, Rasch and Novinger, a conflict of interest. Masino hired a new attorney recommended by O&Y and, while the SEC investigation continued, she remained in her consulting position at O&Y, "training their employees and assimilating [her] 'book of business' into [defendants'] operations." In late June 2009, Masino's new lawyer informed her that, after reconsideration, "the SEC'[s] proposed settlement/judgment was virtually the same." When Masino notified O&Y, they "promptly 'rescinded the oral asset purchase agreement' and terminated the balance of the consulting contract," "refused to return any of the assets," and "continued

to operate [her] 'book of business,'" but "refused to pay the balance of the contract price . . . ." Masino therefore "sued to enforce the contract."

It appears O&Y believed their initial $62,500 installment constituted payment for 144 Opinion's phone numbers, domain names, and any customer contact information and business generated by those resources. It also appears that O&Y concluded, given the taint of SEC fraud findings and Masino's failure to disclose the SEC investigation, no business goodwill existed in her company or continued association with her, and her consulting services were therefore worthless. The trial court may have adopted this view as the reason it excused O&Y from making any further payment on the contract, but the record is not clear. (See, however, *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564 (*Denham*) [appellate court must view record in light most favorable to judgment and indulge all reasonable presumptions to support it].)

As noted, the parties have furnished a meager trial record. Besides the notice of entry of the judgment and her notice of appeal, Masino designated only two documents in the clerk's transcript for the record on appeal: her March 25, 2011, "Election to Rescind" the parties' contract, and the trial court's subsequent entry of judgment on May 4, 2011. The judgment provides that, "evidence, both oral and documentary, having been presented by both parties, and the cause having been argued and submitted for decision," Masino shall "take nothing by her complaint from Defendants . . . ." The court awarded defendants their trial costs and dismissed Masino's breach of contract action with prejudice.

There is nothing in the record on appeal to reflect what evidence was introduced at trial, except the trial court's oral ruling on March 7, 2011, in which the court summarized the trial and the court's conclusions and findings of fact. We infer the

trial ended on March 7, 2011, because the parties eventually augmented the record to include what appear to be their closing arguments on that date. Masino does not dispute, but rather expressly "accepts the Court's factual findings after trial," which we summarize from the March 7 hearing as follows.

The trial court observed that the "initial factual issue to be determined is when did Oswald & Yap learn of the S.E.C. investigation." The court found "the revelation of the S.E.C. investigation did not take place until, as Mr. Yap testified, he received a telephone call from a newspaper reporter sometime in mid-November," 2008. The court noted this finding would "implicate on every single further aspect of this case." Having heard Masino's testimony, the court observed she "is a very good salesperson" and concluded that when defendants learned in November of the fraud investigation, "she sold to Mr. Yap and Oswald & Yap the concept that she wasn't the bad guy in this deal and with proper representation this could all be turned around, and that the only persons who were subject to S.E.C. sanction were the two lawyers who had been writing the opinions. [¶] Ultimately not only did that not prove to be true, but in fact it appears that Ms. Masino conceded the point and acceded to the S.E.C. judgment without contest. I think that has to implicate on this case as well."

Specifically, the court concluded that defendants "were taken in to some degree with the concept of, hey, they . . . like Ms. Masino, she appeared to be[:] A, sympathetic; B, sincere; C, somebody who had previously made things happen with this company. And they thought that at the end of the day, as Mr. Yap testified, no one without a . . . determination of guilt or culpability should . . . have that held against them, and so they continued to work with her to perform their part of the bargain."

But the court concluded that once the SEC reached its fraud judgment, "it is with good reason that Oswald & Yap would say to Ms. Masino, wait, this stops you from working here; wait, this actually can implicate . . . the ability of this enterprise to actually conduct business." The court observed that the SEC's "final judgment . . . bars Ms. Masino personally for five years from participating in [the] offering of penny stock," including "trading, or inducing or attempting to induce, I emphasize those words, . . . the purchase or sale of any penny stock" and "is of such a broad nature as to be so broad that the participation [in] the issuance of 144 opinions would also be barred." The court found the SEC fraud determination was "horribly damaging" to O&Y's attempt to run a legitimate rule 144 opinion "enterprise, such that people would not want to or be willing to do business" with them.

The court reiterated it found "specifically that the S.E.C. investigation was not disclosed timely and truly was not disclosed with the degree of particularity and sufficiency that would be required in order to adequately apprise the buyer of a foundational fact for the purchase or sale of the enterprise." The court held: "I don't actually think that Oswald & Yap would have entered into this agreement at all had they known of the nature of the S.E.C. investigation and the subject of the S.E.C. investigation." The court then ruled "that leaves us with this: no damages to plaintiff on one hand."

The court, however, held out a lifeline for *Masino* to rescind the contract and regain her domain name assets. Specifically, the court continued: "On the other hand at this point Oswald & Yap has a number of domain names that it acquired with a down payment of $62,500 and a one-year consultancy contract." The court found Masino's consulting consideration "terminated" by the SEC fraud judgment. "But as to

the domain names," the court offered, "it seems to me that an election needs to be made and within a very short period of time; that is, to rescind the contract. This would be at the plaintiff's election, to rescind the contract and *upon the payment* of $62,500 from Ms. Masino to Oswald & Yap, Oswald & Yap would transfer the domain names back to Ms. Masino." (Italics added.)

The court continued: "If the *payment* is not made within the time I specify, then the domain names would basically remain in the possession and control and ownership of Oswald & Yap. And so what I plan to do is set a *payment* deadline, or an election — actually it would be a *payment deadline*, you figure out your election as you wish . . . ." (Italics added.) The court set the deadline a month away, on April 6, 2008, and rejected Masino's attorney's request for an extension based on his travel schedule, observing, "You're not the one *paying* the bill." (Italics added.) The court repeated that the "payment *deadline*" was April 6 at 8:30 [a.m.] in this department" (italics added), and ordered O&Y's attorney to prepare the judgment, "although obviously there's a certain condition" to its final terms, i.e., whether Masino timely made her payment.

On March 25, 2008, Masino sent to O&Y, and filed with the court, a document she entitled, "Election to Rescind Subject to Verification of Ability to Return Assets." (Capitalization changed to initial caps only.) She did not include in her letter to O&Y any payment, nor did she file payment with the trial court. Nevertheless, she stated in her "Election" that she "hereby tenders payment of $62,500 to Oswald & Yap[.]" She identified her tender as "in exchange for the 21 items identified on the attached list," and she limited her offer "subject to the condition precedent that [O&Y] *verify* that it has the ability to fully and completely return each of the 21 items on the attached list, free of encumbrances, and with all the rights and title pertaining thereto." (Italics added.) The

attached list identified the 21 items as the 18 domain names, two phone numbers, and one e-mail address Masino transferred to O&Y as partial consideration for their contract.

Having received no payment or notice of actual payment, O&Y did not appear at the courthouse on April 6. O&Y's attorney later explained he understood the April 6 date as a deadline for payment, and when Masino did not make any payment by that date, there was no reason to appear. Masino does not include in the record on appeal the minute order or a record transcript, if any, arising from the April 6 hearing. The court apparently scheduled another hearing on April 8, and both parties appeared on that date. In the meantime, O&Y filed a document, which is also absent from the record on appeal, objecting to any rescission or retransfer of the domain names at Masino's sole election.

O&Y argued at the April 8 hearing that Masino's option for rescission had terminated because she did not make her required payment as ordered by the court. Counsel observed, "[I]t was my understanding that the 30 days was 30 days in which to essentially consummate the rescission, not 30 days in which to at leisure contemplate whether a better deal could be gotten from various other parties, in the meantime damag[ing] further the reputation of Oswald & Yap." Counsel explained he brought a witness, who "can be heard if Your Honor wishes," to testify that "Ms. Masino is currently touting some of the assets around," in other words, offering to sell domain names like 144letters.com to potential buyers and harming O&Y by suggesting "that we no longer own them." Counsel also complained Masino was spreading a falsehood that "[w]e're no longer . . . in the business of writing 144 opinion letters" and that, while O&Y considered cease and desist letters, "[t]hat's only going to exacerbate the situation." O&Y requested that any "right to elect [rescission] be mutual," but argued "in practical terms it's moot because the date of April the 6th has come and gone."

Counsel for Masino argued her "tender" on March 25th sufficed to meet the court's payment deadline. He asserted, without an offer of proof, that O&Y was "only . . . capable of returning" to Masino six out of the 21 assets and *that* was why Masino had made only a conditional tender and not an actual payment. According to counsel, "We had checked on several of these and concluded that they didn't even own them, which is why we tendered it[.]" Thus, as counsel phrased it, "the problem was, well, while Ms. Masino did properly elect and tender the money, . . . over two-thirds of the assets can't even be returned, which was a problem we were anticipating, which is why we officially filed the tender with the court, to put everyone on notice that we were offering the money but, of course, subject to the assets being returned."

When the court asked Masino's attorney, "What does 'tender' mean to you," counsel replied, "'Tender' means we're offering the money if they can return the assets." When the court asked, "Did you deliver up a cashier's check or certified check for $62,500" to O&Y or to the clerk of the court, counsel acknowledged Masino had not done so.

The court inquired whether Masino "ha[d] a sale of these assets if she recovers them," and Masino herself answered that in "talking" to various parties she obtained a $69,500 offer for "[t]he group of 21 intact," which amounted to $62,500 "plus an additional $7,000 for my troubles." She complained that O&Y "didn't have control" over "[m]ost" of the domain name assets "when they offered me the first rescission in June of 2009. These expired in May. There's a ton of them that expired in May 2009." Masino further complained that when she was soliciting offers for the domain names pending their return by O&Y, a potential buyer or buyers balked because some of the domain names were already "up and running" on the Internet under new domain name

registrants and, therefore, they already "must have been let go" by O&Y. Masino did not address the fact that, if the registration had been "let go" in May 2009 as she suggested, it occurred during her consulting role about integrating these assets into O&Y's operations, which was not revoked until June 2009. Nor did she discuss whether any of the domain names may have been "let go" merely subject to lease agreements, a right of redemption, or other provisional term, or whether other means existed to regain lost domain names, so that O&Y could restore them to Masino if so ordered by the court.

At this juncture, the trial court offered to attempt to "fashion a resolution of this matter" with the parties in chambers, but the effort was unsuccessful. Returning to the courtroom, the court noted "the solution that I proposed was unacceptable for reasons that I need not detail on the record, therefore, basically the court is in the position of having to decide at long last how judgment ought to be rendered."

The court concluded Masino's "tender" did not suffice to meet the terms of its March 7 payment order. The court explained its ruling as follows: "A, the court did not indicate anything conditional; B, while there is some representation of the unavailability of some of the listed assets, that representation [being] made by the plaintiff's side, I have no evidence of that from which to make such a determination; and, C, in the court's view the $62,500 needed to be tendered, not simply a statement saying, I'll pay conditional upon proof of something." Consequently, "under the circumstances, the court grants judgment to the defense and against the plaintiff, and I think that leaves the assets in the hands of Oswald & Yap, and [O&Y] will prepare" the judgment to that effect.

Counsel for Masino objected that "on the date the court had set," April 6, he and Masino "did appear in court, and Ms. Masino did bring with her a check for the

full $62,500. And it is my understanding from the court's original order that she could pay on that day. And the only reason that she didn't pay on that day was because the other party did not show up. So that was an actual tender of the money on the date set by the court and [Masino] still has the check."

The court responded, "Mr. Plummer, you were here on that day; Ms. Masino was here on that day. I confess I was somewhat frustrated by the absence of Mr. Sweetnam, but I understand now from his explanation why he was not here." The court continued: "At no time did you deliver that check to the clerk, that I'm aware of, and at no time did I see any attempt to deliver that check to the court and/or to represent that [the] check was being sent down to Oswald & Yap on that date. [¶] And so I actually find this to be part of something of a pattern of gamesmanship that unfortunately doesn't do the job for this purpose. So the judgment will be as I indicated to the defense in this case."

Counsel for Masino again objected that "[t]he reason it wasn't deposited on that date was because you trailed the hearing to this date and we're right here." The court answered, "Nowhere in that proceeding or [on] that date did I order that the expiration date be extended. If you had asked for that, I probably would have considered it, but not having asked for it, [and] not having ordered it, I don't find any extension." The court concluded the hearing, subsequently entered the judgment in favor of O&Y, and Masino now appeals.

## II

## DISCUSSION

### A. *Masino's "Tender" Did Not Constitute Payment as Ordered by the Court*

Masino argues that her notice of election to rescind the contract satisfied the trial court's requirement that she refund the defendants their $62,500 to qualify for rescission. Specifically, she asserts her written offer "hereby *tender[ing]* payment of $62,500.00 to [O&Y] in exchange for the 21 items identified on the attached list" sufficed even though she never actually made the payment to O&Y or to the court on behalf of O&Y. (Italics added.) She relies on an evidentiary rule (Code Civ. Proc., § 2074) establishing that an offer of payment rejected by the obligee qualifies as a valid tender.

Code of Civil Procedure section 2074 provides: "An offer in writing to pay a particular sum of money, or to deliver a written instrument or specific personal property is, if not accepted, equivalent to the actual production and tender of the money, instrument, or property." This and related code provisions operate as "rules of evidence affecting the question of costs and the right to bring actions in cases where a tender is necessary before commencing the action." (*Colton v. Oakland Bank of Sav.* (1902) 137 Cal. 376, 383.) These rules do not prevent a party to whom, for example, $10 is offered to pay a $20,000 claim from insisting on the full terms of the obligation. (*Ibid.*)

Similarly here, Masino's obligation consisted of full payment of $62,500 by a date certain and, therefore, an *offer* of payment is no substitute for actual payment when that is what the court ordered. Despite its later use of the word "tender," the trial court did not order Masino to tender an offer to O&Y, but rather to actually pay them $62,500 and do so by April 6. Moreover, it was not Masino's prerogative to impose conditions on

O&Y before *she* fulfilled the court's order. "A tender is an offer of performance made with the intent to extinguish the obligation. [Citation.] When properly made, it has the effect of putting the other party in default if he refuses to accept it. [Citations.] . . . . [¶] However, a tender to be valid must be of full performance [citation], and it must be unconditional." (*Still v. Plaza Marina Commercial Corp.* (1971) 21 Cal.App.3d 378, 385.)

Here, Masino attempted to impose a verification condition on O&Y before she would make her payment. But a failure to *verify* its ability to return the domain names would not have placed O&Y in default, since the court had not required verification before Masino's payment or O&Y's return of the assets. Therefore, O&Y was not required to accept Masino's unilaterally-imposed verification precondition. *If* Masino timely had made her payment as ordered, either to O&Y or to the court, and O&Y proved unable to return the assets, *O&Y* would have had to seek relief from the court for *its* default in meeting the court's order. But Masino introduced no evidence of O&Y's inability to return the assets and, in any event, she short circuited the proceedings by superimposing her own conditions on the court's order. (See *Wiener v. Van Winkle* (1969) 273 Cal.App.2d 774, 782 ["an unwarranted condition annexed to an offer to pay is in effect a refusal to pay"].)

In effect, Masino's conditional offer amounted to insistence on delaying payment. Thus, while her "tender" verbalized a willingness to pay, "a mere indication of a willingness to perform in the future is not the equivalent of a valid, subsisting tender." (*Waller v. Brooks* (1968) 267 Cal.App.2d 389, 394-395.) In sum, the court required Masino's prepaid refund before she could obtain the return of the domain names, and we cannot say the trial court erred in concluding her tender did not qualify as payment. The

court required payment and she did not pay. She did not pay O&Y, nor did she pay the funds to the court clerk, nor interplead the funds with the court, nor pay them to a third party to hold in trust for O&Y. Because Masino did not make her payment by the time and date the trial court specified in its payment deadline, there is no basis to reverse the judgment.

Masino's reliance on authority that depositing monies with the court does not constitute a valid tender is unavailing. (See *Rauer's Law & Collection Co. v. Sheridan Proctor Co.* (1919) 40 Cal.App. 524.) First, the tendering party's sua sponte attempt in that case to pay into court *an amount arising under a different obligation* than the contract at issue, and to have the payment constitute an offset, has no relation to the facts here. Second, and more fundamentally, the trial court here did not authorize a tender or offer of payment to satisfy Masino's refund obligation, but instead required payment. As discussed, the record is undisputed Masino failed to make that payment and she therefore fails her burden to demonstrate reversal is required. (*Denham*, *supra*, 2 Cal.3d at p. 564.)

Similarly, while Masino argues the court "trailed" the April 6 hearing to April 8 as a continuation of the April 6 hearing, and therefore effectively extended her timeframe for payment to the later date, she has not included in the record on appeal the court's April 6 minute order or the record transcript on that date, if any, to support that inference. We must presume the judgment is correct (*Denham*, *supra*, 2 Cal.3d at p. 564), and "'[a] necessary corollary to this rule is that if the record is inadequate for meaningful review [on a particular point], the appellant defaults and the decision of the trial court should be affirmed.'" (*Gee v. American Realty & Construction, Inc.* (2002) 99 Cal.App.4th 1412, 1416 (*Gee*).) The trial court was emphatic it had not granted

Masino any extension of her payment deadline, and Masino presents no basis to reverse that determination.

B. *Masino Presents No Record Evidence of Her Claim the Contract Was Inseverable*

Masino contends obliquely in two brief paragraphs that "partial rescission is not an option" because "[t]he subject contract for the purchase of [her] 'book of business' was not severable." We infer from this vague claim that Masino is arguing the terms of her contract with O&Y prevented the trial court from leaving the domain name assets with O&Y upon her failure to refund the initial $62,500 O&Y paid her. It appears Masino is suggesting the trial court had to find a way to require Masino to make her refund payment or, in the alternative, require O&Y to pay her $62,500 to fulfill the contract, even though her failure to disclose the SEC investigation, which resulted in a fraud judgment barring her from the industry, undercut any value in her consulting services or the business goodwill for which O&Y bargained. Masino does not, however, include in the record on appeal *any* testimony or other evidence bearing on the terms of her contract with O&Y. It is therefore impossible to review her contention concerning the severability or inseverability of portions of the contract. (*Denham*, *supra*, 2 Cal.3d at p. 564; *Gee*, *supra*, 99 Cal.App.4th at p. 1416.)

In a related point, Masino argues *O&Y* waived rescission once it became aware of the SEC investigation and failed to terminate the contract immediately. Masino's premise is faulty, however, because the trial court offered *her* the opportunity to rescind the contract by refunding O&Y its $62,500. She did not avail herself of that opportunity, as discussed. Masino also asserts, without any supporting evidence in the record, that O&Y *sold* the domain names Masino claims, again without evidence, were unavailable for return, and she suggests that "by choosing to sell off approximately 70%

of the assets that they had received *after* November 28, 2008" (apparently the date O&Y became aware of the SEC investigation), O&Y necessarily "waive[d] the right to rescind." Because the trial court offered the rescission option to *Masino*, not O&Y, we infer her true target is to undo the trial court's assertedly invalid "partial rescission" of the contract, in which O&Y retained the domain names but did not have to pay for other aspects of the bargain, including business goodwill or Masino's consulting services. This, however, constitutes no more than rearguing her inseverability claim, and has no merit, as discussed.

C. *Sanctions*

We conclude sanctions are unwarranted. Sanctions rest in the court's discretion when a litigant files an appeal that is "frivolous . . . or . . . solely to cause delay." (Cal. Rules of Court, rule 8.276(a)(1); Code of Civ. Proc., § 907.) An appeal is frivolous "when it is prosecuted for an improper motive . . . or when it indisputably has no merit." (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 650 (*Flaherty*).) Sanctions "should be used most sparingly to deter only the most egregious conduct." (*Id.* at p. 651.) Here, the record suggests the trial court may have mistakenly believed a valid "tender" required an attempt to actually pay the obligee the sum due, rather than a written offer to do so, as permitted under Code of Civil Procedure section 2074. Thus, when the trial court mentioned the tender procedure at the April 8 hearing, counsel may have discerned a slim, but potentially viable opportunity to argue on appeal that its written offer was sufficient to constitute an actual tender, contrary to the trial court's impression.

But as discussed, the trial court's terms for rescission imposed a *payment deadline*, requiring Masino to actually make a court-ordered payment and not merely a tender, and do so by a certain time and date, which she failed to do. Additionally, her

tender was invalid because of the verification and implicit delay conditions it purported to impose, as discussed. Nevertheless, "[c]ounsel and their clients have a right to present issues that are arguably correct, even if it is extremely unlikely that they will win on appeal" (*Flaherty*, *supra*, 31 Cal.3d at p. 650), and we therefore decline to impose sanctions.

III

DISPOSITION

The judgment is affirmed. Respondents are entitled to their costs on appeal.

ARONSON, J.

WE CONCUR:

O'LEARY, P. J.

FYBEL, J.